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Ninth Circuit Confirms That Customs Officials Can Freely Search Laptops at the Border

On Monday, April 21, 2008, the U.S. Court of Appeals for the Ninth Circuit held that border agents did not violate a traveler's Fourth Amendment right to be free from unreasonable searches when they randomly searched his laptop and found child pornography. Judge O'Scannlain noted in the opinion that the Court is "satisfied that reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border." See *U.S. v. Arnold*, 08 C.D.O.S. 4533. The Court reasoned that the search of a laptop and its electronic contents is no different than the suspicionless search of luggage, which the Supreme Court has held is Constitutional and permissible. This ruling follows a Fourth Circuit decision rendered in 2005, which similarly upheld customs' agents rights to search laptops upon entry into the U.S. from Canada. See *U.S. v. Ickes*, 393 F.3d 501 (holding that child pornography found on a man's computer upon entry into the U.S. was admissible evidence).

As discussed in our previous alert (*Recent Trends Suggest Travelers Going Abroad Should Do So With A "Clean" Laptop*, March 2008), the outcome of the *Arnold* case indicates that the courts are broadly interpreting the search and seizure power of U.S. Customs and Border Protection (USCBP) agents. International travelers—both U.S. and foreign—should be aware that they may be forced to disclose any information at U.S. ports of entry that resides on all devices that contain electronic data, including laptops, cellular phones, BlackBerries® and other personal digital assistant (PDA) devices. The primary cases on point, *Arnold* and *Ickes*, involve situations where the traveler was engaged in criminal activity. The courts have not, however, limited the circumstances under which customs agents can conduct a search, or require that specific procedures monitor customs agents' use and/or protection of the data searched/seized. It is plausible that agents may view, or possibly seize, a spectrum of confidential data including, *inter alia*, business/proprietary data or trade secrets; customer or client files (which may include business and/or proprietary data) and attorney-client privileged information; and personal data (websites visited, emails, *etc.*).

In light of these developments, travelers should consider carrying a "clean" laptop (*i.e.*, without any sensitive data), and use alternative means to access necessary data from their destination points outside the U.S., such as arranging to log onto a secure company server from a remote access point.

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